(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: **MAY 2 2 2015** OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. We withdrew the director's decision and remanded the petition to the director for further consideration and action. The director again denied the petition and certified the decision to the Administrative Appeals Office (AAO) for review. We affirmed the director's decision to deny the petition. The petitioner filed a motion to reopen. We granted the motion and affirmed our prior decision. The matter is now before us on motions to reopen and reconsider. We will grant the motion to reopen, dismiss the motion to reconsider, and affirm the denial of the petition.

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, (Form I-140) on March 6, 2012, seeking classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. When he filed the petition, the petitioner was a research and development engineer at Connecticut. U.S. Citizenship and Immigration Services (USCIS) records identify the petitioner's current employer as Iowa.[1] The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States.

The director denied the petition on December 12, 2013, stating that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States. We affirmed the certified denial on April 16, 2014, and dismissed the petitioner's subsequent motion on November 28, 2014. A fuller discussion of the underlying issues appears in our earlier decisions.

On motion, the petitioner submits a brief and additional evidence.

In re New York State Dep't of Transportation, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must establish that he seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must establish that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that he will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

In support of his Form I-140, the petitioner submitted a letter explaining the bases for his eligibility for the national interest waiver:

[1] An approved H1-B nonimmigrant petition, receipt number shows validity dates from April 16, 2014, to March 2, 2017. The approval of earlier H1-B petition, receipt number was revoked on March 18, 2014.

> [The petitioner] seeks employment in the field of physics research, wth emphasis in applied research of advanced materials and next generation technologies such as thermoelectrics and nanomaterials. This field is one of substantial intrinsic merit . . . .
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> * * *
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> [I]t is clear that the benefit of [the petitioner's] continued research in the United States would be national in scope. . . . With the continued dissemination of [the petitioner's] research through publications and conference presentations, these benefits will impact all parts of the nation.

In affirming the certified denial of the petition, we stated that, although the petitioner had established that he had previously conducted influential research, this research took place while he was a graduate student at University. Since graduating from University in 2009 with a Ph.D. in Physics, the petitioner has worked for several different employers, but has not shown that he published any new research as part of his subsequent employment. Therefore, his production of highly-cited work during his doctoral studies at University is not a reliable indication of his subsequent, continuing impact on the field of physics research and materials science.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *Id.* at 110.

On motion, the petitioner submits five Forms I-20, Certificate(s) of Eligibility for Nonimmigrant (F-1) Student Status, (Form I-20) dated July 19, 2010; October 26, 2010; October 19, 2011; January 13, 2012; and August 7, 2012. The first four Forms I-20 reflect that after completing his Ph.D. studies at University in 2009, the petitioner engaged in optional practical training (OPT) with four different companies and that his employment was authorized by the university. The August 7, 2012, Form I-20 reflects a "Change of Status/Cap-Gap Extension" based on H1-B petition that was filed on behalf the petitioner on April 9, 2012.

In addition, the petitioner submits five Forms IS-150, Request(s) for Data Validation, (Form IS-150) showing that he reported his changes of address and employment to University. The petitioner also submits an April 24, 2003, Form I-20 that shows he received "Assistantship" funding of $13,000 to cover his "initial attendance" in the doctoral program and a May 7, 2009, Form I-20 that shows "On-campus employment" funding of $19,000.

The petitioner's Form ETA-750B, Statement of Qualifications of Alien, (Form ETA-750B) lists the following post- employment:

November 2009-July 2010

September 2010-September 2011
October 2011-December 2011
, January 2012-present

Based on his F-1 nonimmigrant student status as shown by the Forms I-20 and the Forms IS-150, the petitioner asserts that "according to immigration laws," he "was a University student while filing the NIW [national interest waiver] petition." The record reflects, however, that the petitioner was working as a research and development engineer for in , Connecticut and residing in Connecticut at the time of filing the petition. The petitioner requests that we consider him as a student during the period after his graduation to overcome any concerns about the impact of his subsequent employment. Whether or not the petitioner was considered as a student is not the issue in this matter. Rather, the petitioner has not established that since 2009, when he received his Ph.D. from University, he continued to produce research that has affected the field as a whole.

The petitioner further states:

> Since the petitioner was a student, there was no post- period between the dates he graduated and filed the petition. Nor should there be the AAO's any [sic] concerns about the Petitioner's continuing with so-called "unfinished work" during the "slow period" of his training, or his cooperating with his supervisor and colleagues, or his listing their names as co-authors and University as his affiliation while his papers were published after he graduated.

The petitioner, however, has not pursued a course of academic study at University since 2009. While the submitted I-20 and IS-150 forms show that the petitioner maintained lawful F-1 nonimmigrant status pursuant the regulation at 8 C.F.R. § 214.2(f)(10)(ii) by engaging in authorized optional practical training (OPT) following completion of his graduate studies, the forms do not show that the petitioner continued to study or work principally at University following his graduation. Rather, the record shows that the petitioner was employed at from November 2009-July 2010, from September 2010-September 2011, from October 2011-December 2011, and from January 2012 through the petition's filing date. As discussed above, regardless of his academic status, the petitioner has not established that his OPT with the aforementioned employers has disseminated research findings or created new technologies that have affected the field as a whole.

The petitioner's motion to reopen does not include any new facts or other documentary evidence to overcome the grounds underlying our previous findings. There is no evidence showing that the petitioner's employment after leaving University has generated further peer-reviewed published work or technological advancements that have influenced the field as a whole.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions or legal citation to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition

must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. *See Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991).

A motion to reconsider cannot be used to raise a legal argument that could have been raised earlier in the proceedings. *See Matter of Medrano*, 20 I&N Dec. 216, 220 (BIA 1990, 1991). Rather, the "additional legal arguments" that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached in its decision that could not have been addressed by the party. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Further, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Id.* Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Id.* at 60.

On motion, the petitioner questions our "request for evidence of employment-related achievement" and asserts that we erred in our interpretation of what constitutes "new research." The petitioner previously submitted an article in entitled ' that was submitted to the journal in December 2010 and published in August 2011. In addition, the petitioner previously submitted an article in entitled ' that was submitted to the journal in December 2009 and published in August 2010. The record also includes an April 29, 2014 letter in which Alumni Distinguished Professor of Physics, University, asserted that the aforementioned two papers are "evidence of [the petitioner's new research" and that whether they are "related to his graduate work is irrelevant in judging whether his research is new." We agree that the petitioner has presented new or novel research findings, but he has not shown that such research was undertaken as part of his post- employment duties. As discussed in our decision dated April 16, 2014, the aforementioned articles show the petitioner's institutional affiliation as University's Department of Physics and Astronomy, and all but one of the listed co-authors were also at The information in the articles themselves, therefore, is consistent with the conclusion that the articles report research performed by researchers and not results from the petitioner's projects at or

In a letter dated December 30, 2012, assistant professor at second author of both of the papers under discussion, stated that the petitioner's "data analysis and theoretical modeling after he completed his degree constitute a crucial part for the successful publication of these two peer-reviewed journal papers." It is apparent from comment that the petitioner's late contributions to the papers represent the completion of research that he had begun before graduating and later expanded upon. The petitioner's motion does not address the key ground for denial of the petition, specifically the absence of evidence that the petitioner has continued to perform influential research in

thermoelectric materials. There is no evidence demonstrating that the petitioner's employment outside of has generated further peer-reviewed published work. The response to the certified denial and previous motion do not establish that the petitioner's work at closely relates to the earlier work that formed the basis for the waiver claim. It shows, rather, that the petitioner has occasionally revisited work that remained unfinished at the time he completed his dissertation, while employed at apparently unrelated tasks.

The petitioner asserts that we erred by focusing on his "not-so-successful" OPT work and by rejecting the extensive number of citations associated with his graduate work at University. Throughout this proceeding, we have acknowledged that the petitioner's work at (and, by extension, the follow-up work that he conducted shortly afterwards) has had impact and influence. The denial rested on the finding that the petitioner has not shown that his subsequent employment has continued to have a similar impact. As we stated in our April 2013 remand order: "The purpose of the waiver is to secure prospective (future) benefit for the United States. The waiver is not simply a reward for past work. Rather, USCIS looks at the impact of the petitioner's past work as a guide to what one could reasonably expect from the petitioner in the future." The petitioner has acknowledged that his post- articles derived not from his work for later employers, but from follow-up work that he performed while awaiting permission to begin working for those employers.

The petitioner further states:

> [The petitioner] only needs to prove that there exists work he completed that has significant and continued impact on the field as a whole. Then by inference, if the existence of such work has been proven, evidence that his other work has a similar impact on the field, although helpful to this petition, is an optional burden of proof, which, if not fulfilled, shall not constitute the ground of the USCIS's denial in this case.

Again, *NYSDOT* requires the petitoner to seek "employment" in an area of substantial intrinsic merit and that the proposed benefits of that employment be national in scope. *Id.* at 217. The petitioner, however, has not demonstrated that his post- employment is within a framework that has a national impact.

The petitioner states that we erred in our November 28, 2014 decision by "twisting the witnesses' testimony" contained in the April 29, 2014, letter from the May 9, 2014, letter from and the May 6, 2014, letter from an associate professor at . These individuals assert that USCIS held the petitioner to too high a standard, considering that the petitioner had completed his Ph.D. program less than three years before he filed the petition, and considering how few Ph.D. graduates are eventually able to secure tenured academic positions. The petitioner states: "It is the top 10% ~ 20% Ph.D. graduates in physics compared to whom the witnesses think the Petitioner relatively lacks experience." The issue, however, is not whether USCIS held the petitioner to the standards of tenured faculty. The issue is whether the petitioner's employment after leaving has positioned him so that his future work will continue to impact the field of physics

research and materials science. Regardless, the petitioner seeks an immigrant classification which does not distinguish between recent graduates and long-established professors.

In addition, the petitioner states that individuals seeking a national interest waiver "are only required to prove they are significantly above average level." The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given individual seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that individual cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise. Moreover, assertion that the petitioner, at this early stage in his career, lacks access to full-time research facilities similar to those at does not support the claim that the petitioner's subsequent employment qualifies him for the national interest waiver.

The petitioner asserts that we ignored the witnesses' statements about his two research papers that were published after he graduated from University. The aforementioned letter from dated April 29, 2014, states:

> After [the petitioner] graduated, he co-operated with me and other members of my lab by doing data analysis and theoretical modeling. As my lab has a full set of facility [sic] for material synthesis and characterization, the preparation and measurements of samples were conducted in my lab. Due to his work, we improved the design of experiment, sample preparation and characterization, and thus successfully published the second paper in discussion.

In addition, the letter from dated May 9, 2014, states:

> After [the petitioner] graduated, the other co-authors at actually synthesized and characterized more samples based on the theoretic guidance of [the petitioner], leading to samples with the highest thermal conductivity. I also attested in my first letter that the same measurement-analysis cycles of new samples between [the petitioner] and led to [the petitioner's] second paper and that [the petitioner] and other co-authors met at the in November 2010 to thoroughly discuss the data before it was submitted for publication.

Despite the petitioner's assertion that we ignored the witnesses' statements about the two research papers published in August 2010 and August 2011, our April 16, 2014 decision specifically stated:

> The claims in the January 2014 brief, and in the newly submitted letters, are consistent with our earlier conclusion that the petitioner's published research has all derived from his studies at

or from follow-up work conducted shortly thereafter, and that the petitioner's subsequent work for a succession of employers has not produced any published research.

In our decision dated April 16, 2014, we reviewed a letter from dated December 30, 2013, and other documents in the record relating to a manuscript which asserts that he and the petitioner prepared:

> adds: "[the petitioner] and I had recently put together a full manuscript on the magnetic properties of There is no evidence that any journal had accepted the manuscript for publication. did not claim that this manuscript relied on research that the petitioner continues to perform. It is based, rather, "upon many phone and email discussions in the past 2 years." The petitioner submits printouts of electronic mail messages dated between March 2011 and January 2012. In a January 12, 2012 message, the petitioner stated: "January is a little slow here in my company . . . So I am now reading the data again these days. . . . I'm going to put all the data together and make a story out of them. Do you think we have enough data to publish a paper now?" The correspondence indicates that, while the manuscript itself is new, the information in that manuscript involves data collected previously which the petitioner newly analyzed during a "slow" period at

With regard to the manuscript, our decision dated November 28, 2014, further stated:

> The petitioner asserts that data analysis is part of the research process, and therefore the materials discussed above "are definitely evidence of his new research activities." The petitioner's own statements indicate that the new manuscript is not the result of his recent employment, but an unfinished project from that the petitioner was able to revisit when free time became available.

On motion, the petitioner asserts that e-mails he exchanged with , a Ph.D. student, from March 2011-July 2011 provide further information regarding his most recent "theoretical research" collaboration with University and the "new data" they analyzed for the project. In addition, the petitioner mentions the letter from dated May 9, 2014, that states:

> USCIS questions when the magnetic property data in [the petitioner's] manuscript about were taken. I would like to clarify that a then-Ph.D. student, and I myself measured magnetic susceptibility of [the petitioner's] samples several times from February to July 2011 with VSM (vibrating sample magnetometer). However, the magnetic susceptibility data showed some inconsistency because we expected to see a systematic trend of variation with varying concentration. [The petitioner] and I had "phone and email discussions" regarding how to improve our measurements and to figure out the origin of the inconsistency. The VSM data and the theoretic analysis are included in his manuscript as a very important part to support our assumption about the effects of All these happened after he graduated.

The petitioner asserts that our decision dated November 28, 2014, ignores the aforementioned evidence. Again, there is no evidence showing that any journal had accepted the above manuscript for publication. Moreover, assertions do not overcome our finding that the petitioner has not performed influential research for his recent employers. The *NYSDOT* guidelines require the petitioner to establish that his employment will benefit the national interest, and the petitioner has not done so in this matter. With regard to following the guidelines set forth in *NYSDOT*, by law, USCIS does not have the discretion to ignore binding precedent. *See* 8 C.F.R. § 103.3(c).

The petitioner states that our decisions have a "contradiction with an offer of employment being waived in NIW petitions." In addition, the petitioner asserts that his "case hangs by whether had offered him a job." The issue in this matter is the continuing impact of the petitioner's employment on the field of physics research and material science, and not on the circumstances that prevented University from filing a petition on his behalf.

The petitioner mentions a May 8, 2014, letter from , a production manager at and the supervisor of the petitioner's postdoctoral training at the company. stated: "As an expert in thermoelectrics, [the petitioner] designed graded thermoelectric materials that greatly increased the maximum cooling temperature and cooling efficiency. . . . Based on [the petitioner's] work, has developed infrared detectors with 30% higher sensitivity for high-end customers." The petitioner previously submitted his proposal entitled ' ' but there is no documentary evidence showing its impact on the field. The petitioner asserts that the aforementioned proposal relates to his August 2011 article in The journal article, however, does not show the petitioner's institutional affiliation as While the proposal and the letter from provide information about the petitioner's work at they do not establish his eligibility for the national interest waiver for two reasons. First, as with University, the petitioner had already left before he filed the petition, and he has presented no evidence that his work there offered future benefit to the United States. Second, letter does not demonstrate how the petitioner's work for has influenced the field as a whole.

The petitioner's motion reconsider is not supported by any pertinent precedent decisions or legal citations that demonstrate our latest decision was based on an incorrect application of law or USCIS policy. In addition, the motion does not establish that our latest decision was incorrect based on the evidence of record at the time of the decision.

The petitioner's graduate work with thermoelectric materials at University produced several high-impact articles, and those articles will continue to influence researchers regardless of the petitioner's future immigration status. Since that time, however, the record does not show that the petitioner has continued to perform new research for his subsequent employers and to publish the results from it. In addition, the petitioner has not established that any of his post-employment activities have consistently had a level of impact and influence necessary to demonstrate eligibility for the national interest waiver.

Although the new evidence submitted by the petitioner provided a basis for granting the motion to reopen under 8 C.F.R. § 103.5(a)(2), the submitted documentation does not overcome the grounds underlying our previous decision. Furthermore, as the petitioner's motion to reconsider is not supported by any pertinent precedent decisions or legal citations that demonstrate our latest decision was based on an incorrect application of law or USCIS policy, the motion to reconsider is dismissed.

We will affirm our prior decision for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The motion to reconsider is dismissed, the motion to reopen is granted, our decision of November 28, 2014, is affirmed, and the petition remains denied.